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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,		C055587
Plaintiff and Respondent,		(Super. Ct. No. 06F00658)
v.		
NICHOLAS MONT,		
Defendant and Appellant.		

A jury found defendant Nicholas Mont guilty of first degree murder and sustained an allegation that he personally discharged a firearm in connection with the offenses, causing great bodily injury. The court sentenced defendant to 50 years to life.

On appeal, defendant contends his right to a fair trial was violated by the court's refusal to give a requested pinpoint instruction on imperfect provocation. We shall affirm.

BACKGROUND

Around June or July 2005, defendant's wife of 16 years, Sharon, told defendant she wanted a divorce. Defendant moved out of their house in August 2005. Sharon was the Dean of

National University, having worked her way up to that position during their marriage. Her career path required the couple to move several times during the marriage as she got better jobs. Defendant was a writer who had been working on the same screenplay since 1989. After moving out, he lived off of a \$40,000 inheritance and refereed local soccer games for money.

In November 2005, defendant started taking the drug Paxil to deal with depression. Defendant took the medicine daily as prescribed until Sharon took him off her insurance, which caused the cost of the drug to increase by \$70.

According to defendant, he and Sharon got along amicably after the separation. Sharon wanted him to visit her, but defendant rarely came over because he felt uncomfortable.

On January 20, 2006, defendant turned himself in to the Rancho Cordova police, stating he had killed Sharon. Sharon was found in the office of her house, dead from a single gunshot wound to the head. She was shot in the back of the head, behind the left ear, and the gun was almost in contact with the skin when fired. Defendant brought the weapon, his .357-caliber revolver, to the police station with him.

A

Prosecution's Case

Interviewed by a Sacramento County sheriff's detective, defendant expressed feeling betrayed by the divorce. He wanted no sympathy, but said, "my life was turning into a piece of crap" and "as soon as one person gets a little bit ahead they

forget where they came from." Defendant also thought his wife had a lover.

On the day of the killing, defendant first had lunch with Sharon before they went to her house, where he planned to type his screenplay but they argued over how long defendant would spend at the house. After the argument escalated, defendant left for his storage facility where he retrieved a gun and drove back to Sharon's house.

On the drive back, defendant called Sharon because he had left the manuscript at the house. She was already printing it when he returned. According to defendant, he entered Sharon's home and was in the garage when he "just lost it," loaded the gun, went into the office, and shot his wife. He then grabbed the script and left.

Defendant told the detective he shot Sharon because she betrayed him, as he had put his career on hold while she treated him like an employee. Asked when he developed his intent to shoot her, defendant first replied a few months back, but then corrected himself by stating it was just a passing thought of resentment at how he was being treated.

When driving to the storage unit, defendant wanted his gun, but did not know why. When he went to get the gun, defendant thought if anyone was going to get killed, it would be him. However, he was too "gutless" to shoot himself.

He was not planning to use the gun when he got back to the house, being "nonsensical at that point." Defendant felt angry and betrayed once he got to the house and then decided to shoot

Sharon. At the time of the killing, he was depressed as he had stopped taking his Paxil.

B

Defense's Case

Testifying, defendant said he did not plan to kill himself or harm Sharon on the morning of January 20, 2006. He went off Paxil when he was informed the cost would be \$80 on January 1, 2006, which caused him to feel more depressed.

Around the middle of December, defendant had started on a different version of his screenplay. Sharon let him use the computer to work on it and they were getting along well. However, defendant's interaction with Sharon worsened when he stopped taking Paxil.

On the day of the killing he was very disappointed, having just found out a potential job would pay much less than expected. At lunch, defendant and Sharon got into a political disagreement. Sharon suggested they go to her house, and defendant followed in his car. Defendant planned to spend the weekend typing the screenplay, but within 5 to 10 minutes of starting, Sharon told defendant he had to leave by 4:30 p.m., as Barram was coming to stay.

When asked by defendant why Barram treated him like a pariah, Sharon said it was because of what defendant had done to Sharon. The argument became more heated and they started to scream at each other. At one point, Sharon told defendant she had sex with other men. Defendant, who suspected Sharon of

having affairs, felt she was being cruel to him, so he "lost it," and left the house.

Defendant was enraged, feeling betrayed by Sharon and thought about killing himself to show her. He was shaking with rage as he drove to the storage area, thinking he would get the gun, drive back, and shoot himself in front of her.

After he got the gun, defendant realized he had left the script at Sharon's home, so he called and told her he would come over to pick it up. Sharon said fine and offered to burn a CD of the script. When he got to her house, defendant had to go to the garage, but first entered the office, where he and Sharon started to argue again. When he got to the garage, defendant loaded the gun, although he did not know why. When he walked into the office, Sharon held up the CD over her shoulder in a dismissive manner which seemed like an obscene gesture.

Defendant felt she was belittling the script on which he had worked for 20 years and which he considered a significant contribution to the marriage. He then shot Sharon and left with his script.

The detective was trying to put words in defendant's mouth when asking defendant about having an intent to kill Sharon. Defendant still did not know why he did it, and expressed his deep remorse for what he had done. Defendant did admit to thinking about killing Sharon when he was off his Paxil.

A psychiatric expert testified for the defense. Paxil is a common treatment for depression. Defendant's dosage, 20 milligrams a day, was common for the first use of the drug.

Abruptly ending the medication should not be done without first consulting with a medical professional as it could have adverse side effects. Side effects would begin to show up within one to two days, and could include a return of stronger depressive syndromes, dizziness, sweating, ringing ears, bouts of crying, increased irritability, and anxiety. The symptoms can last from two days to a week or more.

Defendant had not been diagnosed with a major depressive disorder, and the expert admitted to not knowing when defendant stopped taking Paxil. The expert admitted people can suddenly stop taking Paxil and go about their lives.

The investigating detective summarized defendant's screenplay for the jury. The play was set in Sacramento, with previous versions being set in San Diego. The villain is a politician running for Governor, who in one scene rants about a California healthcare system in which one person can pay \$10 for Paxil while another pays \$80. The wife of the politician was seeking to divorce him, so he hired someone to kill her. The murder weapon was a .357-caliber handgun.

DISCUSSION

I

The Instruction Given

The court instructed the jury with Judicial Council of California Criminal Jury Instructions, CALCRIM No. 522, as follows: "Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and the significance of the provocation, if any, are for

you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter."

Defendant requested the court modify this instruction with language from CALJIC Nos. 8.30 and 8.73 so it would read:

"Provocation is a factor to consider in deciding whether the prosecution has proven the defendant has premeditated and deliberated, which is an essential element of first degree murder. Because provocation may [be inconsistent with] [have prevented defendant from forming] premeditation and deliberation, it may be the basis for a verdict of second rather than first degree murder. [¶] The absence of heat of passion and provocation is an essential element of murder which the prosecution must prove beyond a reasonable doubt. If the prosecution has failed to meet this burden, the defendant is not guilty of murder. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider provocation in deciding whether the crime was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter. [¶] If you have a reasonable doubt that the killing was first degree murder, you must give the defendant the benefit of the doubt and find him not guilty of first degree murder. Evidence

of provocation may, by itself, leave you with a reasonable doubt that the killing was first degree murder.”

The court refused the requested instruction, which defendant now claims effectively eliminated his imperfect provocation defense, a violation of his right to a fair trial. We disagree.

II

The Requested Instruction Was Duplicative

“A criminal defendant is entitled, on request, to a[n] instruction ‘pinpointing’ the theory of his defense. [Citations.] As we recently explained, however, instructions that attempt to relate particular facts to a legal issue are generally objectionable as argumentative [citation], and the effect of certain facts on identified theories ‘is best left to argument by counsel, cross-examination of the witnesses, and expert testimony where appropriate.’ [Citation.]” (*People v. Wharton* (1991) 53 Cal.3d 522, 570.) However, a trial court need not give special instructions, even if legally correct, if they are duplicative of other properly given instructions. (*People v. Jones* (1998) 17 Cal.4th 279, 314.)

The proposed instruction essentially repeated other instructions. CALCRIM No. 522 already informed the jury to consider provocation in determining whether the murder was first or second degree or whether the killing was murder or voluntary manslaughter. Specifically, the first paragraph in the proposed instruction was simply a more verbose version of the first paragraph of CALCRIM No. 522, which more concisely informed the

jury it may consider provocation in determining whether the killing was first or second degree murder or manslaughter.

Furthermore, the second paragraph of the proposed instruction was already covered by another instruction given to the jury, CALCRIM No. 570, which provides in pertinent part: "The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder."

Likewise, the portion of the proposed instruction stating "[i]f you have a reasonable doubt that the killing was first degree murder, you must give the defendant the benefit of the doubt and find him not guilty of first degree murder" is already covered by CALCRIM No. 521, which, as given to the jury, stated: "[t]he People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder."

Further, the last sentence of the proposed instruction, which reads: "Evidence of provocation may, by itself, leave you with a reasonable doubt that the killing was first degree murder" was already covered by CALCRIM No. 522 which informed the jury it may consider provocation when determining the degree of murder. The requested instruction was also argumentative, effectively advocating defendant's theory that imperfect provocation reduces the crime to second degree murder.

Defendant argues the jury needed more precise instruction on provocation in light of juror questions regarding whether provocation could be considered in murder as well as manslaughter and could the jury consider second degree murder if it found the criteria for first degree murder. However, the court properly answered the jury's questions by referring it to CALCRIM Nos. 522 and 640.¹

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

BLEASE, Acting P. J.

RAYE, J.

¹ CALCRIM No. 640 instructed the jury on burden of proof and order of completing the verdict forms on greater and lesser offenses.